Case Flow Management

The Essex County Plan

Reference Notes

KF 8732 C37 1987
Case flow management : the Essex County Plans, reference notes.

INDEX

CANADA

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July 5, 1988

The Honourable W. D. Lyon, and
The Honourable P. J. LeSage,
Office of the Chief Judge,
District Court of Ontario,
Suite 1803, 400 University Avenue,
Toronto, Ontario.

Dear Bill and Pat:

RE: Caseflow Management Delay Reduction Seminar
Philadelphia, Pennsylvania - June 26- July 1, 1988

I attended at the seminar in Philadelphia last week. It involved several days of intensive study and work, with activities of one sort or another commencing at about 7:00 a.m. and lasting through until suppertime, with assignments to be dealt with for the following day each evening.

I came into possession of a good deal of material which is available for your inspection, should you care to have a look at it. I also learned of several sources of material, some of which I have ordered, I hope properly out of my $1,000. Some of it I suggest you might wish to consider making available to other judges of the District Court. (More of this later.)

The whole seminar had, as its theme, a recurrently stated position - for the litigant, court action costs too much, takes too long, and seems never to be over. (The last point is probably less relevant in Ontario than in many of the states and in the Federal District Court system in the United States, where appeal procedures can proceed through several layers of courts, as may happen in Ontario with a new intermediate level court of appeal.)

The point was made, again and again, that there seems almost inevitably to be too much focus within the court system on trials, which ordinarily represent perhaps only 4% to 10% of the total number of cases involved in the litigious process, whether civil or criminal.

If there can be said to be a definition, caseflow management involves supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition, regardless of the type of disposition.

The critical elements include:

1. continuous court supervision of cases from filing through termination;

2. adoption of time goals against which to compare system performance;

3. establishment of deadlines for completion of specific case events;

4. monitoring each case to ensure that scheduled events are concluded on time;

5. response by the Court to failure to comply with deadlines;

6. provision of credible trial dates.

At the heart of any such system lies adoption or commitment to the principle that prompt disposition of all cases is a fundamental attribute of justice.

It is argued that for any such system to work, the following must be incorporated:

1. judicial commitment and leadership;

2. court consultation with the bar;

3. court supervision of case progress;

4. standards and goals, including:

   (a) overall time standards governing case disposition for each major case classification;

   (b) intermediate standards governing elapsed time between major case events;

   (c) system management standards concerning such issues as trial adjournments and the annual disposition rate of the Court;

5. a monitoring and information system allowing performance to be compared to the standards set, and allowing court tracking of individual case progress;

6. scheduling of credible trial dates - an absolutely essential key to success;

7. court-control of adjournments, which ought to be limited to circumstances in which unforeseen and exceptional circumstances require diligent counsel to request an adjournment, with continuing control over both the case and the date to which a case is adjourned.

In the days of the seminar, there was great discussion about all the elements listed, and there is a good deal of writing on the subject which is of great importance.

So far as standards and goals are concerned, there was continuing reference to those promulgated by the American Bar Association in its publication, "Standards Relating to Court Delay Reduction", published in 1984, after adoption by the A.B.A. House of Delegates in August of that year.

I can do no better than to enclose the only copy of this publication I presently have, asking that you return it to me when you have looked through it, it being understood that I am making arrangements to order additional copies and would be pleased to receive from you any guidance as to how many copies, if any, you would wish to have for use by the Chief Judge's Office.

Continuing reference was also made to the COSCA standards, those promulgated by the Conference of State Court Administrators in 1983. This organization, which has existed since 1953, represents the State Court administrators of each of the 50 states, the District of Columbia, Puerto Rico, Samoa, Guam, and the Virgin Islands. I enclose herewith a single sheet summary of those standards.

There were, in addition, references to various state standards, including those of Ohio and Kansas, and I enclose herewith a "Summary of Time Standards for Processing Cases", which contains on one sheet the A.B.A. COSCA, Ohio and Kansas yardsticks from time of commencement of action to disposition on the civil side, or from arrest to disposition on the criminal side.

It is important to understand that while these standards have not universally been met in all State and Federal Court systems in the United States, they are very much viewed as goals attainable, and which should be attained, by all court systems in that country. You should further understand that a significant number of Federal District Court and State Court systems have attained the goals or are very close to doing so. It is further to be observed that many of the systems in the United States which are using the goals have

greater problems than do any of the courts in this province, whether those be measured in terms of numbers of judges, numbers of cases, numbers of court-rooms, or financial backing. (The point should also be made that some of the court systems have much greater and continuing financial and other support from public funds than we can realistically expect to have from this province.) Further, the obvious point must be made that in many jurisdictions court systems seek and obtain and spend "their own" money.

Certain points were made again and again in the course of the dialogue over the several days of the seminar:

1. The putting in place of a system with its attendant goals need not await the appointment of new judges, the construction of new court-rooms, or the provision of new funds.

2. A computer is nice and may be important, but is not essential to the installation of a case management system, albeit without a computer things are made much more complex, in terms of monitoring and ascertaining at the beginning what the problems are and what the goals ought to be.

3. No system can work without leadership from the judiciary or those parts of it administratively responsible for the systems, and dedicated co-operation, however hard-won, from administrative officials and the bar.

4. In a memory-dependent system, such as that involved in the courts, older is not better, unlike with some wines. The courts should and must take early notice of cases commenced and actively supervise their progress to completion, because:

   (a) it saves time;

   (b) it saves money;

   (c) it allows the tailoring of the system to the particular case;

   (d) it disposes, more shortly and more accurately, of issues for disposition within the court system.

5. In addition, it is important that the courts do the following things:

   (a) set standards for the bar, the public, the judiciary and administrators;

(b) assure prompt disposition;

(c) assure a court that is neutral and objective;

(d) assure that the court has a system-wide view;

(e) assure that there is recognition that lawyers don't always do the "right" thing;

(f) recognize that delay in a criminal case provides a defence to the accused;

(g) recognize that it has a public responsibility to use its power to move cases along;

(h) recognize that it is the litigant's case and not the lawyer's case;

(i) recognize that it is an independent branch of the government and that involves the court controlling its own processes, and not allowing crown attorneys, for example, to control court processes;

(j) make it easier for lawyers to do what they should do, rather than to place in position punitive rules for failure so to do,

There was great discussion about what has to be done prior to putting in place a case management system of any sort. I will not go into detail on this subject and none of the points made were profound, but they include:

1. Identify with precision what the problems are.

2. Decide what the goals ought to be.

3. Persuade the judges.

4. Get statistical information and compare it with that emanating from other jurisdictions or with time or other standards developed in other areas.

5. Have internal meetings with all court people, from junior clerks right through to the Chief Judge or Chief Justice.

6. Have external meetings with members of the bar.

7. Obtain accurate and detailed statistical information as to "where you are now".

8. Find out, as best one can do, "what's wrong".

9. Recognize that one must deal with the "backlog", as well as with cases entering the system after a new case management system is put in place, since otherwise there will be two sets of rules, two sets of methods of disposition, and certain consequent perceived unfairness. Perhaps it is important, in this context, to have for some time two different tracks with modestly different time standards, or the assignment of older cases to special judges.

10. Perhaps it is important to do a small "blitz" on the old cases, but don't do nothing with the new cases until all the old cases are "out of the way".

11. Recognize that there needs to be the broadcasting of small successes at once, since often there are no real signs of success early in the introduction of a new system.

12. Be sure to develop the capacity to keep accurate and continuing statistics and know with absolute certainty just what statistics you are really going to need.

13. Have the capacity to monitor the system to see in what areas it is working and in what areas it is not, and to attempt to measure the causes, either of success or partial failure, from information to be gathered in an organized way.

One of the things emphasized was that nothing was worthwhile without there being a reliable trial date, which is a key to everything else in the operation of any case management system. (We are, of course, dramatically aware of that, on the civil side, in the District Court in Toronto, and are coming to be more and more aware of it all the time in the efforts we are making to continue to improve the operation of the criminal system.)

There was emphasis placed upon the importance of not just setting ultimate goals for disposition, but setting intermediate goals for the accomplishment of certain tasks in the unfolding of the litigious process. It is important, for example, that conclusion of discovery be tied to a date certain, and that a pre-trial conference also be fixed for a date certain following conclusion of discovery.

There was a great deal of discussion about a newly developing approach, Differentiated Case Management. The principle involved is that civil cases, and perhaps criminal cases in jurisdictions where there is practicality to the

prospect, can be better handled on three or more tracks, rather than one. 7

The place in which Differentiated Case Management has progressed farthest is New Jersey, where they presently have a three-track system - expedited, standard, complex. There have been experiments in the use of such an approach to the control of litigation, particularly in Bergen County, and the experiment has proved successful enough that it is now to be expanded, on more than an experimental basis, to other counties.

In fact, Differentiated Case Management has come into use in a number of the states and is growing.

In essence, expedited cases are processed more quickly with less court involvement and intervention and with shorter deadlines on the way towards disposition.

The standard cases which, for good or ill, represent about 70% of the total, are handled in a routine way with a modestly slower track and some, but modest, court involvement in the process.

The complex case involves early detailed discussions with the judge in charge with specific and detailed orders and directions made as to how the case is to be managed or how it is to unfold, with detailed time schedules fixed after, of course, much consultation with the counsel who are involved with the case.

It may legitimately be argued that perhaps more than three tracks are required, if the necessary judicial involvement with any particular case is properly to be determined. In the new phase of the New Jersey experience, more sophisticated tracking mechanisms are to be designed and put to use for reasons already stated.

The selection of the track rests mainly, in fact, with the lawyers involved, there being, ordinarily, little dispute between counsel on this subject. Final determination of the proper track, should there be a dispute, rests with the judge.

A good deal has been written on the New Jersey experiment, or experience, and some of that material I have should you wish to see it.

Expedited cases generally involve such matters as claims on promissory notes, bank loans, and the like.

Standard cases probably are fairly represented by personal injury claims.

Complex cases are often those which involve very difficult products liability issues, and, in the United States, asbestos cases.

The more complex the case, the more formal, detailed and judge-directed the procedures, with perhaps consequent longer time to disposition.

There was a great deal of discussion about the master calendar, the hybrid, and the individual calendar systems.

As you are aware, the master calendar system is generally that which is used in the Province of Ontario, with a particular judge only being assigned to deal with the trial.

The individual calendar system involves assigning a case from its commencement to a particular judge, who handles all the motions, pre-trial conferences, and, if necessary, the trial.

There are a large number of hybrids, the nature and reach of which is presumably only limited by imagination. There was general preference indicated for the individual calendar system, but with emphasis on the point that choice depended on resources and individual court circumstances.

There was discussion in the course of reviewing case management techniques to Alternative Dispute Resolution and various ways in which many of its forms can be put to use in a court-supervised atmosphere to produce the best result in the least time and at the least cost, and in connection with this, I refer you to my letter of January 28th, 1988, addressed to Mr. Justice Linden, a copy of which was forwarded to you.

In the course of the discussion, there were a whole sea of pieces of information which came out of the discussion, such as, for example, that such hard statistical information as has become available tends to show that pre-trial conferences do not speed up the course of litigation, and that the increase in the number of cases to be handled by a judges does not slow down the pace of disposition of cases assigned to the judge.

Further, the point was made that such statistical information as is available tends to suggest, at least, that

increasing the numbers of judges simply does not help, remedy court administrative problems, granting, of course, that in absolute terms if one has 100 cases, then 100 judges will dispose of them more quickly, probably, than will one judge.

The foregoing is a short and thus probably unfair distillation of a good deal of what was discussed, reviewed, and taught at the conference.

In addition to the enclosures already mentioned, I enclose herewith a copy of the Monograph published very recently by the American Bar Association and written by Maureen Solomon and Douglas Somerlot. Maureen Solomon you know as a very experienced and well-respected court administration consultant. Doug Somerlot is the Project Director of the American Bar Association Lawyers Conference Task Force on reduction of litigation cost and delay. He is responsible for the promotion of implementation of cost and delay reduction programs and, of course, supports the adoption of the A.B.A. court delay reduction standards.

The enclosed monograph is the only copy I have at the present time, and I would ask that you do me the kindness to return it when you have had the opportunity to look at it.

If you wish me to order any copy or copies for the Chief Judge's Office, you have only to ask. I plan on obtaining some for use within the District Court operation here in Toronto. The cost is presently $2.50 U.S. per copy.

There is available, through the office of the Project Director, Judicial Services Division of the American Bar Association, a four-hour videotape of a seminar on case management. I have already recommended to the Joint Committee which is studying the impact of the Zuber Report and is making recommendations to the Attorney General about the future of court administration, that they obtain a copy of this tape so that such members of the Committee, and others who might be interested and who have the time to spend watching it, may have the opportunity of learning more about case management from a group of experts on the subject.

As a result of my recommendations, Janet Wilson, of the Committee, has already been in direct communication with Somerlot and has ordered a copy of the tape and of other materials, some of which are enclosed with this letter.

I hope that I will be able to gain access to the tape without any additional cost. (The price is $95.00 U.S.) I hope to be able to have the opportunity to play the tape, probably early in September, to such members of the District Court in Toronto who may have an interest. It may be that the

prospective audience should be broader than that and I would be very happy to discuss that point with you, should you so desire.

I would like to hope that the Supreme Court of Ontario would have a very real interest in case management, whatever philosophical differences there may be between members of that Court and me about the concept which is involved in judges playing an early and ongoing part in the management of cases entering and flowing through the system.

A significant number of those who attended at the conference have offered to provide to me any help that I might require and that they might be able to afford, and I have received such an offer from Holly Bakke, Special Deputy Commissioner, Insurance Litigation Practices, State of New Jersey. She previously held the position of the Chief of Legal Systems and Procedures for the New Jersey judiciary. She is an instructor for the Institute for Court Management and has served as faculty for in-state training programs for the New Jersey, California, Washington and Florida courts, as well as the National Association for Court Management.

She has been deeply involved in the introduction into the New Jersey system of case management and Differentiated Case Management.

I would be pleased to discuss with you any aspects of what I have learned and that about which I have written in this letter.

Reducing Court Delay Through Active Caseflow Management*

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Any discussion of administrative problems confronting the judiciary in Commonwealth countries inevitably and quickly turns to issues surrounding court delay. In turn, any contemporary discussion of how to deal with court delay soon focuses on a phrase which first came into general use in United States judicial administration about 20 years ago: caseflow management. That term "connotes supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition."[1] To emphasize the role of judges and court officials in this process, the current paper will also use the phrase "active caseflow management".

Research in the United States over the past decade, as well as experience in Canada and Australia, has shown time and again that active caseflow management works. Common law trial courts have been able to reduce the time that elapses between the initiation and disposition of their cases and have been able to enhance their capacity to provide expeditious justice. However, the adoption of caseflow management techniques will require most of the members of the commonwealth judiciary to rethink the role of their courts in the progress of cases within their jurisdiction. Therefore, before discussing some of the techniques and perspectives associated with caseflow management, we should first consider the more common approaches traditionally taken by common law courts to the progress of cases.

STAGE ONE: NON-MANAGEMENT

When we think about a court in which the judges define the narrowest role for themselves, that court will do no management of its caseload. The judge will be in the courtroom at the designated time. If the lawyers who asked to appear at that time are ready to proceed, the case will go forward; if they prefer to adjourn the case to a future date, they may do so. The court's responsibility is to hear the matters counsel

is ready to put before it; if no matters are ready on a given day, the judge has exercised his or her responsibility by being available.

This type of non-management has been justified on the grounds that lawyers should control the flow of litigation in court. However, that justification is utterly inadequate. Regardless of whether and to what extent the profession should control the flow of legal proceedings, lawyers have little control in courts dominated by "stage one" non-management. When judges abdicate any role in managing the flow of cases, the real result is that delays mount even when resources are avail- able. Lawyers are either unable to obtain a court date until far into the future, or unable to have their case heard on the date on which it has been set. In either case, the notion that lawyers control the calendar is a myth.

Non-management can occur not only through underbooking, but also through overbooking. In the former, court officials schedule too few cases because they fail to take into account the substantial percentage of cases that will not go forward on the assigned dates, either because an accused person enters a plea of guilty in lieu of going to trial, or an action has been settled, or counsel are not prepared to go on. In the case of overbooking, court officials seek to ensure that no judge will be idle as a result of matters not going forward, and schedule enough matters to cover any conceivable losses. As a result, the judge faces a crowded courtroom and feels compelled to spend time as a scheduling officer readjusting the times of counsel and the parties. The judge readily accepts adjournment requests, and must still often send litigants home with cases not reached.

STAGE TWO: CALENDAR MANAGEMENT

When the judiciary recognizes that it has a role to play in managing the flow of cases, courts normally move to stage two, what may be termed calendar management. At this stage, courts attempt to control the flow of cases deemed ready for trial. Calendar management thus begins with a ready list--a list of cases that the parties have certified as ready to be given a date for trial. Cases on the list are called for trial periodically by a presiding judge or court official, often at a formal hearing. The cases may be given fixed dates for trial, or may be put on a trailing calendar in which the lawyers do not know the precise date of trial, but must be ready immediately after the completion of the case ahead on the list. Steps are often taken to limit adjournments, either by requiring that they be granted only by the individual responsible for calling the list, or by urging each individual judge to be tough on adjournments.

Stage Two takes the judiciary a step further into the management of the flow of cases, by establishing policies for those cases certified to be ready for trial. The lawyers retain full control over all matters prior to the point of trial readiness, and also retain the discretion to decide when a matter should be certified for trial. Thus when Stage Two is used in criminal matters, the prosecution brings cases before the court that it deems ready for trial, and only at that point are a certain number of those cases placed on the court calendar for a given day or week or sitting.

Calendar management has been justified as the exercise of court control over the flow of cases. But in the same way that Stage One saw little lawyer control, because in practice lawyers could not get their cases on for trial, Stage Two displays little court or judge control, because in practice judges face great difficulties making their calendars work. Court control is focused on only a small part of the process as a whole--the period from certificate of readiness or notice of trial to trial. As a result, calendar management produces very little court control in practice. For example, judicial pronouncements about a tough adjournment policy are meant to alert counsel that adjournments will not be given whenever the parties consent, but only when absolutely necessary. However, the lack of information about pending cases produces recurrent situations where the court does not reach cases on schedule. As this continues to happen over time, lawyers are less likely to be prepared, and the number of "necessary" adjournments is likely to increase. In turn, court backlogs increase, leading the court to set larger numbers of cases that cannot be reached (partly to hide the delays that would be apparent if more realistic trial dates were granted initially). These courts come to depend on the willingness of lawyers to consent to adjournments, and lawyers then come to assume that the court will always "give you a free one," until the situation more closely resembles the non-management model of Stage One.

STAGE THREE: CASEFLOW MANAGEMENT

The third stage moves beyond both non-management and calendar management to active caseflow management. Rather than dividing the flow of cases in half at the certificate of readiness stage and assigning the court responsibility for the last half and the lawyers responsibility for the first half, Stage Three sees the flow of cases as part of a single process that must be monitored from the point when a matter is initiated. Rather than seeing the litigation process as one in which bench and bar are isolated adversaries, caseflow management requires the coordinated joint effort of judges, lawyers and administrative personnel.

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Control has a different meaning at Stage Three. At Stage Two, when court control or judicial control is discussed, the idea has an authoritarian side to it. One thinks of the relationship between superior and subordinate; control derives from the ability to command. Stage Three recognizes that control in the context of a court can emerge only from coordinating the diverse elements in the process, not from expecting obedience to the commands of one participant. This concept of control as a process of coordination was first spelled out half a century ago by Mary Parker Follett, a major figure in early writing on management.[2] She argued that control emerges from a situation in which the participants are aware of what is expected of them, and have sufficient information to coordinate their behaviour with one another.

It is this situation that caseflow management strives to achieve. To do so, expectations must be clear, by the articulation of general system goals and time standards as well as directions applicable to a particular case. Accurate information must be developed and must be shared to enhance the predictability of the process (to ensure that scheduled events can take place as scheduled), to the mutual benefit of both the court and its clientele.[3] Judicial leadership is essential, but within the context of Follett's view of control. Thus judicial leadership is effective only when it is used to promote coordination and the sharing of information necessary to manage the flow of cases. Caseflow management policies must be developed in consultation with the lawyers and court officials whose cooperation is essential to the policies' success. If the judiciary in so many common law countries realized how many court administrators and lawyers are prepared to participate in an effort that, with hard work, can promise real benefits, they would not hesitate to come forward and play the necessary leadership role.

Stage Three does not involve the use of any particular techniques for handling the flow of cases. It does not require the use of a master calendar (the predominant technique in Canada and Australia) or an individual calendar (the technique currently preferred in the United States).[4] It does not require a particular type of pre-trial proceeding. It does, however, require the court to take initiatives to minimize delay, and to gather and use information to produce a smooth flow of cases so that judge, court, lawyer, litigant and witness time are not wasted.

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JUDICIAL RESOURCES AND THE LOCAL LEGAL CULTURE

Delay reduction programs built on principles of active caseflow management have multiplied in the United States since the 1978 publication of research on the pace of litigation in urban trial courts. That research, directed by Thomas W. Church, gathered data from 21 general jurisdiction trial courts (roughly analogous to the superior courts in commonwealth countries). Before Church's research, Americans accepted the dictum of Professors Kalven and Zeisel in 1959 that if you want to reduce delay, you should appoint more judges. But data comparing caseload per judge for the 21 courts indicated that the elapsed time from initiation to disposition of cases was not lower in those courts where the number of cases per judge was lower. There was no relationship between delay and the level of judicial resources.[5]

This finding does not mean that certain courts would not benefit from having additional (or even a full complement of) judges. But it does mean that simply increasing the number of judges on a court is unlikely by itself to reduce delay--unless accompanied by other changes in court practices. If the additional judges merely allow the court to continue doing its business in the same old ways, concluded the research, the "local legal culture" will sustain the delays that characterized the court in the past.

CHARACTERISTICS OF ACTIVE CASEFLOW MANAGEMENT

A number of key elements and assumptions of active caseflow management have been touched on above. They include:

• Reducing delay requires that the court and the judiciary accept responsibility for creating coordinating mechanisms that ensure the smooth flow of cases.

• Reducing delay requires planning, cooperation, monitoring of how the cooperative plan is working, and continuous adjustment and refinement of the plan.

• Reducing delay requires continuing, active and regular consultation with the bar. The lawyers practicing in the court must be represented on any planning committee, and even after an initial plan is developed, information should be exchanged on a continuing basis so that participants can deal with short-term problems before they threaten to upset overall delay reduction efforts.

* Reducing delay requires timely, valid and useful information about pending cases. A workable schedule cannot be crafted without accurate information about the probable length of a case or the likelihood of its settlement. An overview necessary to monitor how well caseflow management is working would be impossible without aggregate data on the aging of cases.

IMPLEMENTING TIME STANDARDS

One of the essential components of any plan to reduce delay is a set of time standards. How long should it normally take different types of cases (criminal matters, small claims, motor accident cases) to move through the overall court process, and the major stages of that process? These time standards should be considered without reference to existing arrears: if a new court were set up, how long should it take to deal with a case following the filing of the initial writ in a civil matter or the first appearance in a criminal matter?

If a court has heavy arrears that produce a substantial gap between how long a matter should take according to the time standards and how much time it normally takes today, that court might consider doing what was done in the state of New Jersey or in the city of Montreal, Quebec. A new caseflow management system was instituted for all cases filed after a certain date. That system involved new administrative procedures designed to increase the accuracy of the court's information and to ensure that new and tighter time standards could be met. A proportion of the judges of those courts were assigned to the cases coming in under the new system. While this "second track" came into operation, the remaining judges addressed themselves to resolving the accumulated arrears. This two-track system meant that during the initial period, the court would be facing an even larger caseload (both its old cases and the new cases that were being dealt with more promptly), and would need additional temporary assistance. The Superior Court in Montreal used a new innovation to deal with its five years of arrears in civil cases. The Chief Justice went to the leaders of the bar and asked that certain senior and respected members donate a part of their time as "ad hoc judges" who, when the parties consented, could hear evidence and arguments in many of the backlogged cases. Once a number of lawyers had volunteered, the Chief Justice went to the government and secured compensation for their timely and selfless efforts. The five-year backlog was erased within two years.

SIMPLIFYING EARLY STAGES

Time standards should not assume that all the existing stages prior to trial should remain, or should be handled in the same way. Any delay reduction plan should consider all the procedures and practices from the initiation to the disposition of a case. It should recommend elimination of unnecessary steps, and simplification of complicated steps.

Are there things currently done by judges sitting in their courtrooms that could be done as easily, quickly, cheaply and effectively outside the courtroom, by non-judges? Parties should not be required to make unnecessary court appearances. Many courts have found that dealing with a case in two or three appearances, rather than five or six, has the effect of enhancing the capacity of the court by freeing up existing judicial resources.

REDUCING ADJOURNMENTS

One of the most obvious ways to reduce the number of appearances per case is to reduce the number of adjournments in a given case. The frequent use of adjournments has been a continual source of tension between judges and lawyers in common law courts. Each blames the other for frequent adjournments. In fact, the process of blaming is a fruitless endeavour. Only by joint action of both judges and lawyers can a caseflow management system be developed in which adjournments are less frequent because they are less necessary. For example:

* A caseflow management system in which the flow of cases is monitored (the progress of cases is tracked by court officials) can notify lawyers in advance of forthcoming court events, and check to ensure that lawyers are ready to proceed.

* When the court is more fully aware of the status of a case, it can more accurately fix dates for hearing. Therefore, cases would not be placed on a court list for a day when they would be unlikely to be reached, and since lawyers could expect their cases to be reached, the court could in turn expect them to be fully prepared (and could sanction the few who lack adequate grounds for not going forward as scheduled).

In the words of the foremost American expert in court administration, Ernest C. Friesen, "events should occur when they are scheduled to occur," and lawyers' "schedules should be reasonably accommodated."[6] A caseflow management system premised on these principles can operate more expeditiously and perhaps even set, as in Montreal, a goal of "trial by appointment" instead of the old practices that saw the resolution of disputes replaced by the attrition of those disputes, and saw justice give way to leverage.

USING INFORMATION

Information is a necessity for an effective delay reduction program. Court officials monitoring case progress must learn the extent to which cases are progressing within prescribed time periods, and must keep track of the frequency of adjournments. That way, for example, the number of cases scheduled for hearing on a given day can be adjusted upward or downward to ensure the accuracy of the lists, or judges could be shifted to a side of the court where case progress is falling short of established goals.

Many courts have found it worthwhile to computerize their information systems. However, it is essential to remember that no computer can be brought into a court to "solve" that court's delay problems. Unless the court has a plan to reduce delay, the court will not be able to tell the computer specialists what information should be collected or what reports should be produced. If the computer experts decide these matters on their own, the reports that will be produced may never be read by the judges and court officials for whom they have been designed. Computers have often played an important role when they have accompanied efforts by courts to reduce delay through active caseflow management, but computers have failed when they have merely been substitutes for the planning and hard work needed from the human beings within a court.

METHODS OF JUDICIAL ASSIGNMENT

One of the major components of any caseflow management system is the method of assigning cases to particular judges. At the same time, however, research results in the United States suggest that no single method of judicial assignment will necessarily reduce trial court delay. Twenty years ago, American judges believed a master calendar system, in which judges were assigned to different stages of cases, was the only

answer. Ten years ago, the 21-court study seemed to suggest just the opposite: an individual calendar system, in which each judge was responsible for his or her own list of cases, was used more frequently in the faster trial courts and less frequently in the slower trial courts. This year, further research will be published that concludes that the pace of litigation is not related to the judicial assignment system.[7]

Relatively large courts in Canada and the United States have often benefitted from hybrid assignment systems. In one such system, a small team of judges (from two to six) would exchange cases among its members when one judge is overburdened and another short on any given day. As a result, more cases could be scheduled on any given day with the likelihood that they would be reached than if the judges did their own lists by themselves. Another variation of team calendaring would have one judge dispatching cases to the other members of the team for hearing as they become available.

A particularly effective hybrid assignment system has been developed in the Provincial Court (Criminal Division) in Toronto, Ontario, by Associate Chief Judge Harold A. Rice. Each judge sits one week in turn hearing first appearances in an intake court. The judge schedules the case for hearing over a subsequent 90-day period. That same judge then hears those cases on the assigned dates. Since the judge has received assurances from the parties at the first appearance that they will be ready to proceed on the assigned date, a strict adjournment policy is feasible. Other sources of delay, for example the appointment of counsel through legal aid, can be monitored. Judge Rice also monitors the progress of cases on a daily basis, continually adjusting and fine-tuning the system to meet changes in caseload and resources.

CONCLUDING OBSERVATIONS

The particular techniques used in active caseflow management vary from court to court, depending for example upon the size of the court or its jurisdiction. But whether a court has a single judge or grows to the size of the Tis Hazari courthouse in New Delhi, whether a court handles a small number of long and complex cases or a high volume of short matters, active caseflow management is worthwhile. Recent evidence may be found in the detailed Report on Trial Coordination Project of the Provincial Court of Alberta, Canada, issued in October 1986. The project, proposed by Chief

Judge C. A. Kosowan and directed by Judge Darlene Wong, led to substantial reduction in the elapsed time for criminal cases in the city of Edmonton. The perspective of the project is set out in the report's conclusion:

> During the early stages of the project, a well-known member of the Bar voiced the apparently widely held opinion that the problems of the system are actually very few and could be readily eliminated if the judges demanded better performance from other participants and were more strict in enforcing that demand in the courtroom. The results of the project directly contradict such statements.
>
> . . . [P]roblems in the Edmonton Provincial Court (Criminal) are not caused by the abuses of certain participants. Rather, the system, itself, contains numerous defects, most of which are individually minor. However, the various combinations of these defects are a constant cause of stress in the system. . . .[8]

The Edmonton judiciary, bar and court officials found that the approaches of Stage One and Stage Two must give way to a coordinated effort to reduce delay through active caseflow management. Their experience has been repeated in other jurisdictions in North America. It is well worth consideration and action in other common law countries.

Citizens often expect frustration and even unfairness from the state's bureaucrats, but continue to hold higher expectations for the courts. We who work in the courts often nurture those expectations by the value we place on the courts as institutions. With that higher institutional value goes a greater commitment to make the institution work to serve the fundamental principles of justice it represents.

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FOOTNOTES

* This paper draws on two pieces of earlier work: Chapter One of Caseflow Management Policy for Victorian Courts, a report prepared for the Courts Advisory Committee, Melbourne, Victoria, Australia (1987); and "The Use of Active Caseflow Management to Reduce Court Delay," a paper presented to a workshop at the India International Centre, New Delhi, March 1, 1988.

1. Maureen Solomon and Douglas K. Somerlot, Caseflow Management in the Trial Court: Now and For the Future (Chicago: American Bar Association, 1987), p. 3.

2. Mary Parker Follett, "The Process of Control," in Luther H. Gulick and Lyndall F. Urwick, eds., Papers on the Science of Administration (New York: Institute of Public Administration, 1937), pp. 159-69.

3. The clearest current statement of these principles may be found in Ernest C. Friesen, "Cures for Court Congestion," 23 Judges' Journal 4 (Winter 1984).

4. For discussion of these case assignment systems and related issues, see Perry S. Millar and Carl Baar, Judicial Administration in Canada (Kingston and Montreal: McGill-Queen's University Press, 1981), Ch. 8.

5. Thomas W. Church, Jr., et al., Justice Delayed: The Pace of Litigation in Urban Trial Courts (Williamsburg, Virginia: National Center for State Courts, 1978), pp. 36-39. See also Thomas W. Church, Jr., "The 'Old and the New' Conventional Wisdom of Court Delay," 7 Justice System Journal 395 (1982).

6. Quoting Friesen, note 3 above.

7. See the study of delay in urban trial courts by Barry Mahoney et al. (Williamsburg, Virginia: National Center for State Courts, in press).

8. Report on Trial Coordination Project (Edmonton: Office of the Chief Judge, The Provincial Court of Alberta, October 1986), p. 39.

COURT ADMINISTRATION

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THE MYTHS OF REDUCING DELAY

By participating in a series of delay reduction seminars, sponsored by the Institute for Court Management of the National Center for State Courts, I have had the chance to observe court professionals' reactions to the idea of making basic changes in the way they do their work. These observations, and other opportunities to talk to people involved in the process of making changes in their courts, have lead me to conclude that there are recurring themes encountered in these situations.

When trying to alter the way courts operate, certain objections are likely to be heard. These are the *myths* that people construct to protect themselves from the ravages of change. Like most myths, those related to implementing delay reduction are based on fact. Thus, they cannot, and should not, be dismissed out of hand. As managers, judges and administrators must be prepared to deal with this phenomenon.

People attempt to apply a kind of deductive reasoning:

> No one wants to implement something that is bad.
> This idea is bad! (It has a problem.)
> Therefore, don't implement it *at all.*

If mankind had stayed with this kind of logic, we would never have harnessed fire. Making change has never been an either/or proposition. Some rational balancing of the relative merits and problems of the innovation and the process of change must be completed.

Let me catalog some of the most common myths in implementing delay reduction and suggest some appropriate responses to them.

1. Too much concentration on numbers, not enough emphasis on justice.

In the words of New Jersey State Court Administrator Robert Lipsher, "Delay reduction is a justice enhancement project."[1] A goal of caseflow management is to reduce the time between the occurrence of significant events, not to diminish the quality of the events themselves. A poll of the Vermont lawyers who tried cases under the pilot delay reduction programs in that state indicated that 90 percent found no impact on their ability to prepare their cases. Most felt that there was no effect on the type of disposition or on the amount of the settlement.[2]

The Commentary to Standard 2.50 of the *Court Delay Reduction Standards*, itself quoting several other sources, responds to this myth as follows:

> Justice delayed is justice denied. Delay devalues judgments, creates anxiety in litigants, and results in loss or deterioration of the evidence upon which rights are determined. . . .The public expects and deserves prompt and affordable justice. Delay signals a failure of justice and subjects the court system to public criticism and a loss of confidence in its fairness and utility as a public institution.[3]

2. My court doesn't have a problem, I can give any lawyer who asks a trial within three months.

Although this statement may well be true, it does not consider those cases that have been filed but in which the attorneys have not indicated readiness or have not requested a trial date. An example of this type of thinking is counting pending cases only from filing of the readiness document. Standards 2.50, 2.51, and 2.52 of the *Court Delay Reduction Standards* emphasize the need for judicial control of the case from filing. The California legislature recently recognized the need for early control as a part of the Trial Court Delay Reduction Act of 1986[4] which requires that cases be counted from first filing.

3. We need more money, staff, or judges before proceeding.

A 1986 survey conducted by the Conference of State Court Administrators (COSCA) indicated that the number one problem facing the courts was a shortage of resources.[5] The "less is more" philosophy and the concepts associated with "cutback management" have been developed as management survival kits in an economy of decreased and decreasing resources. Yet, although every casualty insurance risk manager and corporate litigation counsel has recognized this economic fact of life, courts and law offices still often fail to recognize that the longer any case remains pending, the more resources of every type are consumed. Caseflow management is an attempt to control the consumption of resources in order to allow the courts to function effectively within existing or decreasing funding levels.

4. I can't be tough on lawyers, they will defeat me at the next election.

The local lore of any jurisdiction that has successfully dealt with delay is replete with examples of the incorrectness of this statement. One of the most highly rated state trial judges in Cleveland, Ohio, after the delay reduction program was implemented in the early 1970s was George J. McMonagle, who also had the most current docket. One of the original four judges in the Maricopa County (Phoenix), Ar-

izona, program that became nationally recognized as "fast-track" was Justice Sandra Day O'Connor.

Trial lawyers are strong individualists who instantly distrust anyone who would seem to be limiting their prerogatives. They dislike judges who are unreasonable and arbitrary, not those who are strong and fair. After attorneys recognize the benefits of a program, they often become strong boosters. Trials that begin when scheduled allow counsel to plan their time better, too. Second and subsequent trial settings that require counsel to "relearn" the case, and double or triple travel costs for expert witnesses, consume everyone's resources.

5. My situation is unique, someone else's solutions can't possibly work in my court.

The California Court of Appeals, Third Appellate District, in Sacramento, California, developed a highly successful program for reducing the delay in the processing of cases. The program required that, in certain types of cases, briefs be limited in length. The amount of time for preparation of the briefs was also reduced. To compensate for these reductions, counsel were allowed an unlimited amount of time for their oral arguments. Research indicated that counsel took almost no additional time for their oral presentations, but that the total time to conclude the cases decreased dramatically.[6] Based upon this success, an attempt was made to replicate the program in the California Court of Appeals, First Appellate District, in San Francisco. Although there was some reduction in the amount of case processing time, the San Francisco program was abandoned after one year. What no one had realized was that a large percentage of cases in the San Francisco Court proceeded from a waiver of oral argument.[7]

The appropriate response to the "uniqueness myth" is: don't import programs, import ideas and concepts tailored to the unique situation of the particular court.

To those who say that their court is unique, I would respond that they are absolutely right. Yet, the research discloses that there are common threads running through successful delay reduction programs:[8]

- Leadership by the presiding judges;
- Commitment by the judiciary;
- Good communications between and among the system participants;
- Accountability for the completion of work;
- Time standards to serve as performance measures;
- Case management procedures to allow the court to control the caseflow;
- Management information to monitor the flow of cases;
- Attention to detail.[9]

6. I already have too much to do.

One question commonly asked by judges in delayed courts is, "Why should I put in a program that will get more cases ready when I can't complete the backlog that I already have?" A court must solve the backlog problem in order to deal effectively with the newly filed cases. However, the existing backlog should not be an excuse to ignore the new filings. Everyone has heard of courts that have adopted "crash programs" to deal separately with big backlogs. All too frequently, a visit a few years later will reveal that the backlog has returned. Without addressing the basic issues that allowed the backlog to develop, the problem recurred as soon as the "crash program" went away.

The courts, like the world in general, are populated by two kinds of people: those who are controlled by events and those who control events. Courts that are too busy to install a system that permits them to perform more effectively and efficiently are being controlled by events. Of course, courts (and people) who have the least time to change are always the ones that could benefit most from the implementation of something new.[10]

The reason for making the change is to allow the judges to work "smarter," not harder.

7. We have to get rid of the backlog before we can think about beginning any new problem.

The "too much to do myth" is often tied to the "get rid of the backlog myth." The Washington County, Vermont, Superior Court developed a delay reduction program to begin after a backlog reduction program was completed. In a year's time, the court had made substantial progress in reducing the backlog and concluding all of its cases more promptly. The Chittenden County, Vermont, Superior Court began a similar program accompanied by a simultaneous caseflow management program for newly filed cases. At the end of a year, the Chittenden County Court had made more progress in reducing its backlog and more promptly concluding its cases than had the Washington County Court. The explanation was that the implementation of both programs at the same time more quickly altered the expectations of the "local legal culture" served by the court.[11] A program must deal with both backlog and new filings to have the greatest likelihood of permanently reducing delay.

8. We already tried this and it didn't work.

Nothing so completely discredits a new idea as failure. But, merely because someone else tried it before is not *absolute* reason not to try it again. The causes of the earlier failure should be determined, if that is possible. Unless the reasons for the initial failure still exist, and are unchangeable, a second attempt might succeed. Changes in personnel, altered economic conditions, or a new commitment that something must be done may tip the scales in favor of success.

In the "cutback management" era, public institutions must evaluate, learn from their mistakes, and modify their plans, instead of abandoning promising innovations because of an initial lack of success.

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7. The authors of this article were the research reporter and chair respectively, of the Judicial Council Committee on Improving Jury Communications.

8. §§ 805.13(2)(b) and 972.10(1)(b), Wis. Stats. The statutes require an instruction conference with counsel prior to giving such preliminary instructions.

9. §§ 805.13(2)(a) and 972.10(1)(a), Wis. Stats.

10. By order effective July 1, 1986, the Wisconsin Supreme Court amended the statutes under its rulemaking authority (§ 751.12, Wis. Stats.) to preclude juror notetaking during opening statements as well as closing arguments.

11. §§ 805.13(4) and 972.10(5), Wis. Stats. By order effective July 1, 1986, the Wisconsin Supreme Court amended the statutes to require submission of the burden of proof instructions in writing also. Such instructions were adjudicated not "substantive" in *Matter of E.B., supra*, note 3.

12. Waiver of counsel for the negative mode was deemed necessary in light of dicta in *Matter of E.B., supra*, note 3 at 185-88.

13. Wisconsin statutes are silent on jury questioning of witnesses. See, however, *People v. Heard*, 388 Mich. 182, 200 N.W. 2d 73 (1972) and 31 A.L.R. 3d 872.

14. Other procedures are possible. For example, Judge Warren Wolfson of the Cook County (Ill.) Circuit Court has allowed jurors to submit written questions to the bench during the first few minutes of deliberations after direct and cross examination of all witnesses was complete. McHugh, *Cook County innovation: jurors question witnesses*, CHICAGO DAILY LAW BULLETIN, January 27, 1986.

15. Should Jury Trials Be Abandoned in Complex Cases? Joseph H. Tate, Esq., Philadelphia, PA. Address to Judicial Administration Division, New York, NY, Aug. 12, 1986. See also Campbell & Le Poidevin; *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965 (1980); Ungar & Mann, *The Jury and the Complex Civil Case*, 6 LITIGATION (3) 3, 64 (1980); Comment, *Non-Jury Trial of Civil Litigation: Justifying a Complexity Exception to the Seventh Amendment*, 15 U. RICH. L. REV. 897 (1981).

16. H. Kalven, Jr. & H. Zeisel, THE AMERICAN JURY (1966); Report of the Committee on Juries of the Judicial Council of the Second Circuit (Aug. 1984); Charrow & Charrow, *Making Legal Language Understandable: A Psycho-linguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Forston, *Sense and Non-sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601; Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976); Austin, *Research Supports Note-taking by Jurors*, 56 CLEV. B. J. 46 (Dec. 1984); Elwork, Alfini & Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432 (1982); Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC'Y REV. 153 (1982); Hastie, et al., Summary of the Survey of Practices Relevant to Jury Trials in the Seventh Circuit (May 1985, unpublished paper presented to Bar Association of the Seventh Federal Circuit).

Somerlot

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For example, the reversal of a case on appeal where a memorandum opinion was written should not forever doom the lower court to write full opinions in every case. Instead, ask the question "What must be done to preserve this labor-saving device and still comply with the higher court's mandate?"

Another mistake to learn from, as most public sector managers would agree, is that nothing is so rare in the implementation of programs as good evaluation. Too frequently, there is no feedback mechanism in place, or evaluation is considered only after the program is in operation.

9. I'm a judge. I'm not good at administration.

The most dangerous myth of all is the "I can't do this myth." One hallmark of a good lawyer, the kind who becomes a good judge, is attention to detail. For the lawyer that means:

- Complete discovery of the facts;
- Complete research of the legal issues;
- Analysis of the strengths and weaknesses of the case and the opponents;
- Planning for all contingencies;
- Flexibility to shift strategies in order to meet unforeseen events;
- Ability to emphasize strengths and neutralize opposition.

Those are exactly the traits needed to develop and implement a successful program. A good lawyer who became a good judge can become (and probably is) a good case manager, if he or she wants to be. The mental skills are there, it is only the commitment that must be nurtured.

Creating a commitment to solve the problems of the courts can be the product of recalling the reasons that courts, as an institution of government, came to exist. An excellent description of the reasons for courts is contained in the Preface to the Ohio Rules of Superintendence for the Courts of Common Pleas, written by the late C. William O'Neill, Chief Justice of the Supreme Court of Ohio.

> It is to be remembered that the courts are created not for the convenience or benefit of the judges or lawyers, but to serve the litigants and the interests of the public at large. When cases are unnecessarily delayed, the confidence of all people in the judicial system suffers. The confidence of the people in the ability of our system of government to achieve liberty and justice under law for all is the foundation upon which the American system of government is built.[12]

1. Robert D. Lipsher, Administrative Director of the Courts, New Jersey, Comments at Institute for Court Management Delay Reduction Workshop, St. Paul, Minnesota, (September 1986).

2. Connolly and Smith, *How Vermont is Achieving a Delay Free Docket*, 23/3 JUDGES J. 41 (1984).

3. National Conference of State Trial Judges, COURT DELAY REDUCTION STANDARDS, Section 2.50 commentary (1985).

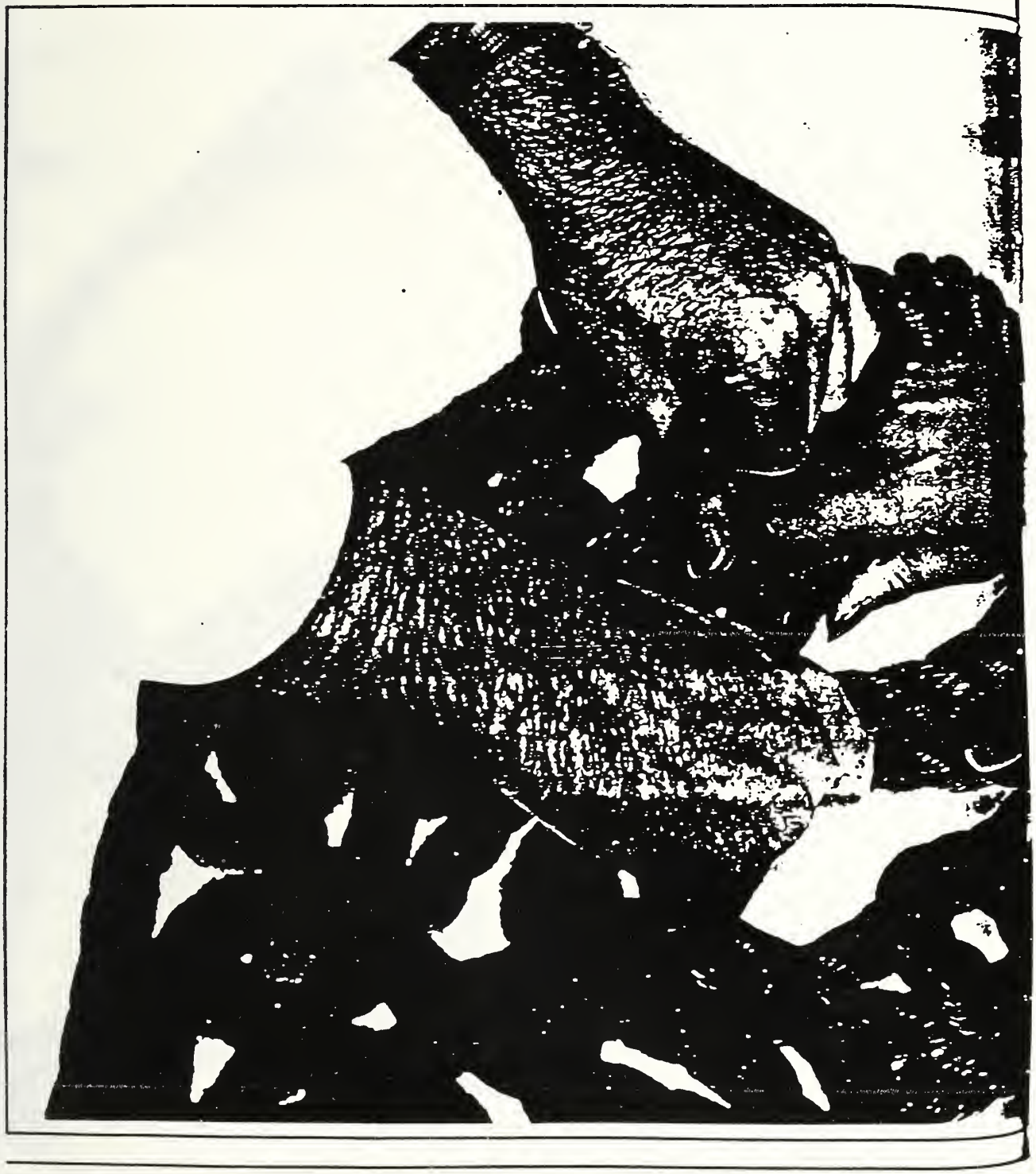
4. *See* AB 3300, The Trial Court Delay Reduction Act of 1986.

5. Conference of State Court Administrators, 1986 Survey (1986).

6. Chapper and Hanson, *Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal*, 42 MD. L. REV. 696 (1983) *reprinted in* ACTION COMMISSION TO REDUCE COURT COST AND DELAY, ATTACKING LITIGATION COST AND DELAY: PROJECT

Cures for Court Congestion

The state of the art of court delay reduction



Herbert Jackson

It is popular when noting the persistence of court delay to recite a litany which demonstrates that it has always been with us. Quick references to Shakespeare and the Bible leave us with a sense that we are dealing with an intractable problem and an admonition that certain things cannot be changed. Those references notwithstanding, court delay has been substantially reduced in the past several years in this country. For the first time in the history of judicial administration, the dynamics of delayed court procedures are understood and the remedies and resources available for application.

It would be purely conjectural to attempt to identify when the modern movement to reduce delay began. In the late 1940s Chief Justice Vanderbilt's efforts undoubtedly focused attention on the management of the courts, but his application of Roscoe Pound's court organization doctrines, although bringing forth many improvements, had little perceivable effect on delay. In the late 1950s, publications such as *Ten Cures for Court Congestion,* put forth by the ABA's Section of Judicial Administration, and Levin and Wooley's *Dispatch and Delay,* contained thoughtful analyses for court reforms, but these as well had little practical effect on reducing court delay.

The doctrine of judicial responsibility for controlled case flow was perhaps first publicly advocated in the 1950s by the Pretrial Committee of the Judicial Conference of the United States, headed by Judge Alfred P. Murrah, chief judge of the Tenth Circuit Court of Appeals. This

By Ernest C. Friesen

[illegible] is the dean of the California Western School of Law and is director of the school's Justice Institute

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idea was not readily accepted when it was introduced, and it is by no means universally accepted today. The birth of judicial control over cases in the federal courts came slowly, as judges worked with the pretrial committee to aid them in conducting better trials.

The early application of judicial control procedures was judge intensive. Individual judges had to talk with lawyers eyeball to eyeball to make the procedures work. Individually controlled calendars were considered necessary to accomplish consistent results.

Through the efforts of retired Justice Tom C. Clark in his position as director of the newly created Federal Judicial Center in 1968, individual judicial calendar control finally achieved acceptance in 1969. To this day, judicial control is considered by many to depend on the strong, consistent judge-lawyer contact possible only with individual calendars.

The establishment in 1963 of the National College of State Trial Judges (now the National Judicial College) marked the beginning of a widespread advocacy of judicial control in state courts. Unfortunately, the advocacy at that time lacked an empirical base. Discussions of calendar control systems resulted in more heat than light. Examples of successful programs proved contradictory theories. One leader announced that the surest way to calendar control was to change the system every two years. In the early 1970s the debate increased as federal delays decreased and state court delays remained static or increased.

In the absence of the court program financed by the Federal Law Enforcement Assistance Administration, the debate might well have continued. Committees would have continued to meet, compounding their ignorance. LEAA, by supporting several major investigations into court delay, made possible some elementary studies.

It was the National Center for State Courts, in a carefully conceived study, which documented the irrelevancy of most of the conventional wisdom. Neither the existence of strong central court administration nor the presence of a local court administration reduced delay, they found. Pretrial conferences and pretrial settlement procedures did not necessarily reduce delay; nor did arbitration procedures and other mediation procedures. Perhaps most significantly, there was no direct correlation between the judge-to-case ratio and the amount of delay.

The initial National Center findings were basically negative. They documented the need for careful experimentation with actual programs.

While the National Center was exploring delay across a macrocosm of major metropolitan centers, the Justice Institute (Whittier College) was experimenting with a successful microcosm. Multnomah County (Portland), Oregon, has successfully reduced its felony court delay from six months to less than 45 days over a period of two years. The Justice Institute undertook to document what they had done to accomplish this amazing result and to find out if four other jurisdictions could benefit from the knowledge.

The Justice Institute discovered the critical factors which had led to the Multnomah County experience and applied them in Montgomery County (Dayton), Ohio, Dade County (Miami), Florida and Providence, Rhode Island. Each location reduced delay by 25 percent or more by adopting elements of the several critical factors. The institute expanded its program to include 11 other jurisdictions, and produced similar results.

The National Center, after its initial analysis, undertook experiments in several cities looking at both civil and criminal calendars. They experimented with single factor changes and multiple factor changes. The net result was data which, when merged with the Justice Institute experiences, support the basic conclusion that court delay is controllable; that it is basically a problem of intensive management by persons committed to controlling delay; and that it requires a high degree of communication between various agencies and actors involved in the processes.

Experimentation continues today as the American Bar Association Action Commission persuades courts at all levels to initiate efforts to control delay. Through these efforts and the efforts of the Conference of Chief Justices, trial court conferences and state court administrators, the programs started in the mid-70s are beginning to take hold. Kansas, New Jersey, Alaska and Alabama have major programs. Many trial courts are successfully halving their waiting times. Court delay reduction is an idea whose time has come.

The consistent results which emerged from the work of the National Center and the Justice Institute have led to a new understanding of case-flow management. Although each locale has special dynamics which require local applications, basic concepts have been discovered which will reduce unnecessary delay when consistently applied.

CONTROLLING THE CASE-FLOW

Systems of case-flow management vary widely from state to state and among the locales of a given state. Some of the variations must be accommodated as necessary because of local rules and relationships. Others are aberrations on good management and should be changed. Each locale must design and imple-

The court should take early control of the cases and maintain continuous control

ment its own system—but subject to several universal concepts:

(a) The court should take early control of the case.

(b) The court should maintain continuous control.

(c) Events should be scheduled within short time limits.

(d) Attorneys' schedules should be reasonably accommodated.

(e) Events should occur when they are scheduled to occur.

These concepts must be understood and applied no matter what the local variations in rules and relationships are if case-flow is to be managed. Although they seem simple enough, their importance requires further explanation for those who may not have encountered them in regular court experience.

Early Control. The court must be aware of the incoming cases and accept responsibility for their existence. The citizen involved in the litigation believes the case is in court and as such has a right to expect the court to assume responsibility for its progress. The courts exist to do justice in each individual case and likewise to appear to do justice. They can accomplish neither of these purposes if the movement of the case is left to the convenience of the conflicting interests of attorneys or clients.

In practice, early control means only that the commencement of a case by arresting a defendant or filing a civil action triggers a monitoring process. The court (usually the clerk) records the time in, then a system takes over in which the case will be brought up for review at a fixed time in the future. If a hearing is required, the time of the hearing is made routine. If an answer is due, a reasonable time for routine answers is fixed. By setting the case into the clerical routine, the case is in control.

Continuous Control. It is not enough to begin control if control is thereafter lost. Responsibility for movement stays with the court through its staff.

Operationally, continuous control requires that each scheduled control point or event causes the next control point to be fixed. No case ever goes into judicial limbo. Cases which cannot proceed for good reasons are given a future review date to make sure the conditions haven't changed. Cases not proceeded against within reasonable time periods are dismissed. If parties and witnesses attend a hearing, they are given official written notice of the next hearing before the hearing is adjourned.

Short Scheduling. Lawyers, like all professionals, have relatively constant tolerances for urgent behavior, i.e., there are times during which they act because they believe that it is important for them to do so. For some attorneys, only that which must be done today is urgent; for others, events 30 to 60 days hence may be urgent. Each element of the profession seems to have its own span of urgency.

For lawyers who practice regularly, with trials averaging from one to five days, a matter which comes up in two weeks needs attention, but a matter three to four weeks away is shunted aside to make room for immediate work.

Scheduling events for case-flow effectiveness requires the creation of a sense of urgency in the trial lawyers. A careful analysis of the real reasons for continuances (as contrasted with the ones given) indicates that most cases are continued because one or more of the lawyers was not ready.

Experimentation with short scheduling techniques supports the view that when a "triggering" event is enforced within two weeks of an important event, there are fewer requests for continuances. Thus, if the court requires the lawyers to meet and number their exhibits (for identification only) within two weeks of an "issue" pretrial conference, the pretrial conference will accomplish its purposes. The numbering of exhibits *triggers* the necessary preparation for the pretrial. Likewise, a structured plea negotiation conference at a date and time certain before the status conference or trial reduces the number of continuances requested at the later time.

Reasonable Accommodation of Lawyers. The litigation process is not served if lawyers can't make a reasonable living from litigation. Programs of calendar management which increase the cost of appearance or which force an attorney to choose between clients in court appearances are dysfunctional. The reasonable accommodation of lawyers involves a continuing honest communication link between the courts and the active litigators.

In practice, cases should be scheduled as early as possible for all of the important court events. Lawyers should be present with their calendars when scheduling events and should be accommodated within the concept of short-scheduling. When, however, lawyers are engaged in long trials that unreasonably exceed tolerable time limits, the court should insist upon a change of counsel. This should be a very rare occurrence, usually with lawyers who take more cases than can be reasonably accommodated. Change of counsel can only be accommodated reasonably when it occurs sufficiently in advance of a critical hearing to permit new counsel to adequately prepare.

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Brachtenbach

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keeps the large picture in mind. Encourage staff to be candid about problems. Involve staff beyond the director with the committees. Visit the sites. Keep legislators informed (we took legislators on a van tour to sites with presentations en route).

If you, as a judge, become involved in the development of a system, three things are essential. First, recognize that you must commit a great deal of time (and frustration). Second, be patient—this is a major task. Third, engage, encourge, and support a competent enthusiastic staff—your key to success.

Friesen

(Continued from page 7)

Events Occur as Scheduled. The expectation that events will occur as scheduled is an accumulation of the effects of applying the earlier concepts. If there is a strong doubt that events will occur, preparations will not take place and even those cases that reach trial on time more often will fall out for unexpected reasons.

All trial courts must overschedule (i.e., set more cases for hearing or trial than can take place). Cases settle unexpectedly, witnesses die or disappear, and many other events can throw off court schedules. The prevailing wisdom has been that cases should be scheduled in such a way as to guarantee that judge time on the bench is fully utilized, with the obvious result that many items must be postponed.

The long-run consequences of adhering to this procedure, however, are disastrous. Despite some short-term successes, when lawyers believe court pronouncements that their cases will be heard on the date set, nothing will change if the goal remains keeping the judges fully occupied. Attorneys will see that nothing has changed, that cases won't be reached, and that they don't have to prepare. If their case by chance should come up, then they are prepared to ask for a postponement.

Many devices are necessary to create the expectation that events will occur when scheduled. Judge-time need not be optimized in hearings. Work should be so organized that a judge is expected to do chambers work during those times when cases do not materialize for a hearing. The telephone should be used to keep track of busy lawyers on a daily, even hourly basis. Motion hearings and similarly short events should be scheduled in hardship cases before and after (not during) regular trial hours. Overset calendars should always have a back-up mechanism, i.e., there should be a way to pull a judge out of low-priority work when necessary to accommodate an unanticipated number of cases ready for trial. Inevitably, the back-up mechanism goes happily unused most of the time, but when combined with short-scheduling and early settlement procedures, it helps to ensure that events occur when scheduled.

The result of applying these basic concepts is that cases drop out of the system with substantial predictability. Experienced participants in American litigation agree that the best disposition of a case is a settlement between two prepared lawyers. If this premise is accepted, the purpose of the court—to do justice and otherwise resolve disputes fairly—is best accomplished by assuring that lawyers get prepared to settle the case. Lawyers properly prepared and given the opportunity to dispose of a case by settlement, settle at a remarkably high rate. Managed case-flow results in both early and fair (prepared) settlements.

RESISTANCE TO JUDICIAL CONTROL

Opponents of the controlled management approach to delay reduction usually argue from one of three premises. First, they argue that the problem is one of inadequate resources. Since everyone is working hard, the only solution is more judges, courtrooms, lawyers, and staff. Second, they argue that control is a bad cure. Heavy-handed judges eliminate due process and otherwise interfere with the adversary process. Third, they argue that delay is not bad. Cases need time to mature. Given time many of them go away.

Because of their persistence, each of these views must be carefully considered.

1. Resources Are Not Adequate. The research conducted by the National Center for State Courts has laid to rest the notion that the basic cause of court delay is insufficient judges, lawyers, clerks, bailiffs, court reporters, etc. Courts with the same number of judges often deal with greatly varying case loads. Although the research encountered many problems that made comparison difficult, the results were far too consistent to be disputed. Massive infusion of judges and courtrooms is not the primary cure for court delay.

One research project actually traced delay to the *addition* of law clerks to trial judges. Inexperienced clerks took more time to do tasks than their judges, who ended up waiting for clerk action before acting themselves.

The Justice Institute's programs led almost universally to substantial delay reductions, yet in no instance required additional judges, prosecutors, clerks, or bailiffs. In only one area was additional space required, and there it was temporary.

It would, of course, be absurd to assert that a lack of resources is never the cause of delay. A lack of resources *can* be the cause of delay, but most of the time it is not.

2. Control Is a Bad Cure. Most of the arguments addressed against controlling delay are aimed at imagined inroads on due process of law. Implicit in the opposition therefore is the suggestion that courts which undertake to control delay somehow diminish necessary due process of law. The principal argument suggests that judicial control of the pace at which cases are prepared,

interferes with the attorney's opportunity to adequately prepare.

It may well be that specific judges in their zeal to bring delay under control have not allowed time for adequate preparation. Just as there are judges that don't know the law or who misapply it, there are judges who arbitrarily misuse delay controlling procedures. As in all human institutions, execution of ideas is subject to abuse. It is, however, a much greater denial of due process to allow memories to fade and become distorted by repeatedly postponing hearings at the whim of lawyers than to force lawyers to a quick preparation. Whether there was adequate preparation time allowed has always been a ground for appeal as an abuse of discretion.

Due process of law is fundamental in an adversary system. It requires that each side have notice of the claims made and that there be an opportunity to present each side to an impartial judge. That opportunity includes an adequate time to prepare, to investigate, and organize a presentation. No one who advocates control of delay would suggest that due process be sacrificed in a trade off for a quick resolution.

If one uses terminology carefully, one might call the time necessary to prepare and present all matters "processing time" and the time not used in preparing and presenting "waiting time." The object of delay control must be to control waiting time. Even then the object is not to eliminate waiting time but to control it sufficiently to assure a fair disposition of the case.

If one postulates a case consisting of two witnesses for the plantiff (both local) and one witness for the defense (also local) and five relatively short exhibits—how much waiting time is necessary? A case prepared and disposed of within short time limits is likely to be better prepared at lower cost than one which accommodates long waiting periods on both sides.

Another way of looking at the problem is to consider the number of cases which must be pending to have a four-year court supply compared to a one-year supply. Basically, it takes four times as many in the lawyer's office as well as in the court. Trying to remember the facts and relationships in 400 cases is much harder than dealing with 100. The time necessary to relearn the variables in the case once or twice a year is inherently dysfunctional.

3. Court Delay Is Not Bad. Court delay is bad, not abstractly, but because it affects each of the purposes for which courts exist. Delay results in the loss of justice through the loss of the facts necessary to do justice. Memory diminishes, witnesses are lost, evidence becomes distorted. Dispute resolution long postponed leaves the litigants to less peaceful pursuits. The delayed formal recognition of legal status necessary in uncontested cases distorts lives and impedes adjustment to changed relationships. Arbitrary government action allowed to persist is the very oppression which led to the American Revolution.

Given that delay distorts the purposes for which courts exist, one must wonder at the national commitment to those purposes. The truth is that the people subject to court delays are highly incensed by it. The factor most commonly given as the reason for dissatisfaction with the courts is their delay.

The attitude that delay is not bad comes principally from judges and lawyers who have become insensitive to the destructive effects of court delay. The growing resistance of clients in civil cases to rapidly increasing attorney fees is, however, focusing the attention of the legal profession on the high cost of redundant preparations and procedures. The costs of litigation once absorbed by clients with little comment has now become a source of resistance in even the largest and wealthiest firms.

Clear evidence of client unhappiness with civil court delay comes from experiments which require that the client join in all formal motions for a postponement of action. This requirement, when vigorously enforced, results universally in halving the number of requests for postponement. Lawyers don't seem to need as many postponements when they have to explain the need to their client.

A classic conflict of interests exists between the lawyer and client. Expensive court procedures are expensive because of the fees charged by lawyers. The more procedures, the more fees. Though there is little evidence, outside of criminal defense, of intentional court delay, the lack of any positive incentive for expeditious behavior allows delay to prevail.

The judicial process, in fact, includes many incentives to avoid case resolution. Delay helps accused crimnals to go free. Delay generally works in favor of one party or another in a civil suit. Long probate procedures leave assets in banking institutions and run up costs. Insurance companies making money on their investments rather than underwriting, have incentives to move slowly.

DIFFICULT BUT POSSIBLE

Many lawyers and judges have recognized the need to control delay and have been frustrated by their inability to bring about the necessary changes to see it accomplished. The coordination of efforts necessary to bring about changes is massive. No one is in charge of the process. The independence of judges, the nature of the adversary process and the organizational divisions built into the governmental structure make traditional business management arrangements impossible. The organizational responsibilities cannot be fixed in ways analogous to business organizations where most of the incentives are at least to produce and market products.

Because court delay reduction is difficult, it requires concentrated and concerted action across organizational lines. A progression must be designed by all involved and executed by the leaders of the several organizations involved. Fortunately, successful state and local units have been organized to this end to provide needed assistance. The job may be difficult, but for judges committed to reducing unnecessary delay, the know-how and resources are at last available.